

FILED _____

AT _____ O'clock ____ M
CLERK, DISTRICT COURT

Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

STATE OF IDAHO,)
)
 Plaintiff,)
)
 vs.)
)
 ALISHA BRITTNEY CAMPBELL,)
)
 Defendant.)

Case No. **CRF 2009 24532**

**MEMORANDUM DECISION AND
ORDER DENYING DEFENDANT'S
MOTION TO SUPPRESS**

Arthur Verharen, Deputy Kootenai County Prosecuting Attorney, lawyer for Plaintiff.
Dennis Reuter Coeur d'Alene, lawyer for Defendant Campbell.

I. FACTUAL BACKGROUND.

On December 2, 2009, at approximately 1:40 a.m., defendant Alisha Campbell (Campbell) was stopped by Officer Cantrell (Cantrell) at the corner of 15th Street and Best Avenue. Campbell was driving a black sports utility vehicle with no license plate affixed to the front and the rear license plate attached to the middle of the rear bumper. Upon interacting with the driver to gather her license, registration and proof of insurance, Cantrell was able to smell an odor he believed to be marijuana and requested that Officer Craig Buhl (Buhl) and Buhl's K9 respond to the scene to assist. Cantrell identified the three male passengers and asked Campbell to step out of the vehicle and to come speak with Cantrell away from the others. Cantrell states in his police report Campbell explained the vehicle smelled of marijuana because "we just smoked", and further explained she and passenger

Derek Hague (Hague) had smoked marijuana in the car while parked at a friend's house. Police Report, p. 1. Buhl's K9 alerted on a backpack on the floor in front of the passenger seat, and Campbell informed him the backpack belonged to Hague. Buhl states Campbell relayed she had driven Hague to his home from the friend's house after individuals there wanted to purchase marijuana from him, Hague retrieved the backpack from his home, and they returned to the friend's house where Hague then sold at least two bags of marijuana. *Id.*, p. 2.

Cantrell then performed field sobriety tests on Campbell. She failed all three evaluations: horizontal gaze nystagmus, walk and turn, and the one-leg stand. Campbell was then placed into custody for DUI. She now moves this Court to suppress statements she made during the arrest.

The Criminal Complaint in this matter was filed on December 2, 2009. On February 12, 2009, a preliminary hearing was held. Following that preliminary hearing, the bind-over order (Order Holding) was filed on February 12, 2010. That Order requires Campbell to file all pretrial motions and accompanying briefs within 42 days of the February 12, 2010, Order. On April 6, 2010, Campbell filed her motion to suppress. Campbell filed her motion to suppress eleven days beyond the March 26, 2010, deadline imposed by the Order. On April 29, 2010, the Court held a pre-trial conference at which the State objected to Campbell's motion to continue the trial. Campbell sought a continuance as her motion to suppress was not going to be heard until May 26, 2010; the State argued the motion to suppress had been untimely filed. The Court ultimately granted the motion to continue. Campbell's untimely motion to suppress dated April 6, 2010, had put the State on notice of what Campbell claimed her argument to be. This matter is currently set for a two-day jury trial commencing on August 2, 2010. The State filed its brief in opposition to Campbell's

motion to suppress on May 24, 2010. Oral argument on the motion suppress was held on June 23, 2010.

At the June 23, 2010, hearing, Officer Craig Buhl testified. Buhl testified that he heard Cantrell's call on December 2, 2009, at about 2:30 a.m., to the effect that Cantrell had stopped a vehicle. Buhl testified that Cantrell did not call for assistance, but that Buhl and Cantrell were a "team" that night, and unless Buhl was otherwise occupied, he would automatically go to wherever Cantrell has stopped someone. Buhl testified it took him about one to two minutes to arrive at the scene of the stop at the convenience store at 15th Street and Best Avenue. When Buhl arrived, he noticed Cantrell's car parked behind Campbell's car. A few minutes after Buhl arrived, another patrol car and officer arrived. When Buhl arrived he saw Campbell out of her vehicle talking to Cantrell, and Campbell was standing about fifteen feet behind her vehicle. Buhl could not hear what they were talking about. Cantrell told Buhl he smelled marijuana, and asked Buhl to take his dog over to the car. Buhl's dog alerted on a back pack, and Buhl found marijuana and a bag of pills inside the backpack. All this occurred within one to two minutes after Buhl's arrival. After Buhl found the backpack, he went back toward Campbell, who was standing in the same spot he had last seen her, however, Cantrell had previously walked away from Campbell to go talk to the three males still inside Campbell's vehicle. Buhl talked to Campbell about what he had found. When Buhl began that conversation, Campbell was alone and not handcuffed. Campbell told Buhl the backpack belonged to "Derek". Buhl asked her if she knew what was inside the backpack and she replied "No". Buhl asked her if she had been smoking marijuana, and she replied that she had two roaches with a friend. Buhl then walked away from Campbell and finished searching with his drug dog, then put his dog back in his patrol car. On cross examination by Campbell's attorney, Buhl was asked if

Campbell was free to leave at the time he was talking to her. Buhl testified it was Cantrell's investigation, and that was up to Cantrell, but as far as Buhl was concerned she could have walked into the convenience store or walked away. Buhl testified he did not know what Cantrell was planning on doing with Campbell and that Cantrell had not told him anything about what to do with Campbell.

II. STANDARD OF REVIEW.

In an appeal from an order denying a motion to suppress, the Court of Appeals will not disturb findings of fact supported by substantial evidence, but will freely review whether the trial court's determination as to whether constitutional requirements were satisfied in light of the facts. *State v. Hawkins*, 131 Idaho 396, 400, 958 P.2d 22, 26 (Ct.App. 1998); *State v. Whiteley*, 124 Idaho 261, 264, 858 P.2d 800, 803 (Ct. App. 1993). When evaluating the trial court's determination of voluntariness of consent given, reviewing courts will not disturb such a decision on appeal if the trial court's finding is based on reasonable inferences to be drawn from the record. *State v. Post*, 98 Idaho 834, 837, 573 P.2d 153, 156 (1978). Whether consent to a search was voluntary is a question of fact and reviewing courts accept the factual findings of a trial court unless they are clearly erroneous. *State v. McCall*, 135 Idaho 885, 886, 26 P.3d 1222, 1223 (2001). Findings are not deemed clearly erroneous when supported by substantial evidence in the record. *State v. Benson*, 133 Idaho 152, 155, 983 P.2d 225, 228 (Ct.App. 1999).

III. ANALYSIS.

Campbell states only that she:

...was detained and questioned by police during a DUI arrest. Questions were asked of her about what drugs were used that night, at a time when there were several officers present, and she was not free to leave.

Motion to Suppress, p. 2. No argument is being made that the stop was unlawful. Indeed,

having seen the lack of a front license plate, Cantrell had observed a violation of I.C. § 49-428(1),(2) (requiring a license plate to be securely fastened to the front and rear of a vehicle). As Cantrell retrieved Campbell's driver's license, registration and insurance, Cantrell noticed the strong smell of marijuana in the vehicle.

The purpose of a stop is not necessarily fixed at the time the stop is initiated, because "during the course of the detention there may evolve suspicion of criminality different from that which prompted the stop." *State v. Sheldon*, 139 Idaho 980, 984, 88 P.3d 1220, 1224, citing *State v. Parkinson*, 135 Idaho 357, 362, 17 P.3d 301, 306 (Ct.App. 2000). An investigative detention is a permissible seizure if it is based upon specific articulable facts justifying a suspicion that the detained person has been, is, or will be engaged in criminal activity. *Terry v. Ohio*, 392 U.S. 1, 26, 88 S.Ct. 1868 (1968); *State v. Sheldon*, 139 Idaho 980, 983, 88 P.3d 1220, 1223 (Ct.App. 2003). An investigative detention must also be reasonably related in scope to the circumstances justifying the stop. *Sheldon*, 139 Idaho 980, 983, 88 P.3d 1220, 1223. And, although the use of a drug dog may not unreasonably lengthen the duration of a stop, a drug dog sniff is not a search and may be performed during an investigative stop. *Illinois v. Caballes*, 543 U.S. 405, 409-10, 125 S.Ct. 834, 838-39 (2005). In *State v. Aguirre*, 141 Idaho 560, 112 P.3d 848, (Ct.App. 2005), the Court of Appeals wrote, "It is therefore not necessarily a Fourth Amendment violation to ask unrelated questions about drugs and weapons, or to run a drug dog around the perimeter of the vehicle." 141 Idaho 560, 563, 112 P.3d 848, 851. Thus, Campbell's driving without a front license plate resulted in the traffic stop having been lawful and, after smelling marijuana, Cantrell had at least a reasonable articulable suspicion of criminality different (driving under the influence and/or possession of a controlled substance) from the one which prompted him to stop Campbell's vehicle (missing front license plate).

Campbell argues she was in custody at the time she made statements regarding drug use to Cantrell. Motion to Suppress, p. 1. Cantrell's police report indicates he asked Campbell to exit the vehicle and speak to him away from the three male passengers. Cantrell asked her whether there was marijuana in the vehicle, which she denied, and asked her why the vehicle smelled like marijuana, to which she replied, "we just smoked." Police Report, p. 1.

To the extent Campbell's statements were elicited in violation of *Miranda*, this would nonetheless not result in the suppression of physical evidence discovered as a result of the unwarned statement. *Woodward v. State*, 142 Idaho 98, 106, 123 P.3d 1254, 1262 (Ct.App. 2005). "In other words, with regard to physical evidence later discovered, there is no such thing as 'fruit of the poisonous *Miranda* violation.'" *Id.*, citing *United States v. Patane*, 542 U.S. 630, 124 S.Ct. 2620 (2004).

This Court's analysis of Campbell's statements she seeks to suppress under *Miranda* is as follows. In *Miranda*, the U.S. Supreme Court held that police must inform individuals of their right to remain silent and their right to counsel before undertaking custodial interrogation in order to protect the Fifth-Amendment privilege against self-incrimination. *Miranda v. Arizona*, 384 U.S. 436, 467, 86 S.Ct. 1602, 1624 (1966). The *Miranda* rule applies where an individual is "in custody" or where their "freedom of action is curtailed to a degree associated with formal arrest." *Berkemer v. McCarthy*, 468 U.S. 420, 440, 104 S.Ct. 3138, 3150 (1984) (quoting *California v. Behler*, 463 U.S. 1121, 1125, 103 S.Ct 3517, 3520 (1983)). Interrogation includes not only express questioning, but also its functional equivalent; interrogation under *Miranda* refers to "any words or actions on the part of the police... that the police should know are reasonably likely to elicit an incriminating response from the suspect." *State v. Person*, 140 Idaho 934, 939-40, 104

P.3d 976, 981- 82 (Ct.App. 2004) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 300-02, 100 S.Ct. 1682, 1689-90 (1980)).

In *Berkemer*, the Court held that roadside questioning is generally a routine traffic stop that does not amount to a “custodial interrogation.” *Id.* at 437, 104 S.Ct. at 3149. The core inquiry is “whether a traffic stop exerts upon a detained person pressures that sufficiently impair his free exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights.” *Id.* The totality of the circumstances must be evaluated to determine whether such pressures were present. Factors to consider include: the location of the interrogation, the conduct of the officer(s), the nature and manner of the questioning, the time of the interrogation, and other persons present. *State v. Medrano*, 123 Idaho 114, 117-8, 844 P.2d 1364, 1367-68 (Ct.App. 1992).

This Court must determine whether Campbell's statements (that she had used marijuana with Hague and had driven him to retrieve marijuana to sell at the friend's home) were the result of custodial interrogation without the *Miranda* requirement having been met. The two features of an ordinary traffic stop that lessen the danger that a detainee would be induced to respond to an officer's questions where he would not otherwise freely do so were identified in *Berkemer*; they are: (1) that detention pursuant to a traffic stop is presumptively temporary and brief and (2) that a traffic stop is open to public view and involves at the most two officers, making a traffic stop less “police dominated” than custodial interrogations of the kind at issue in *Miranda*. *Berkemer*, 468 U.S. 420, 437-39, 104 S.Ct. 3138, 3149-50. In this regard, the State argues only that Campbell was not in custody for purposes of *Miranda* because the officers never pulled their weapons, Campbell was never placed in handcuffs, the officers never threatened Campbell, and the questioning by the officers was not “lengthy” or “harsh.” Brief in Opposition to Defendant's

Motion to Suppress, p. 3.

In Idaho, the burden of showing custody rests with the defendant who seeks to exclude evidence because of a failure to administer *Miranda* warnings. *State v. James*, 148 Idaho 574, ____, 225 P.3d 1169, 1172 (2010). In *James*, the Defendant moved to suppress his confession of ownership of methamphetamines arguing that the investigative traffic stop had evolved into a custodial interrogation such that *Miranda* warnings were required; the Idaho Court of Appeals suppressed James' admission because of several factors contributing to the coercive atmosphere: the traffic stop took place in the middle of the night on an interstate freeway and afforded little exposure to public view; James knew that when the interrogation occurred it was no longer an investigation of a traffic violation, but had become an investigation of a felony drug offense; all occupants in the vehicle had been subjected to a frisk, which is not usually done during a traffic stop but is permissible for officer safety purposes; and the officer's interrogation technique, threatening to arrest all occupants if none admitted possession of the drugs, was more coercive than usual traffic violation questioning. *State v. James*, 2008 WL 2389490, at *3-4 (Ct.App., June 13, 2008) (reversed by 148 Idaho 574, 225 P.3d 1169). James argued an officer's threat to arrest all occupants of an automobile if no one occupant incriminated themselves triggered a duty to give *Miranda* warnings. 148 Idaho 574, ____, 225 P.3d 1169, 1170. The Supreme Court reversed the decision of the Court of Appeals and held *Miranda* warnings were not required because James had failed to meet his burden of demonstrating his freedom of movement had been curtailed to the extent associated with formal arrest. 148 Idaho 574, ____, 225 P.3d 1169, 1173.

The Court in *Berkemer* considered a variety of factors: the short duration of the stop, the modest number of questions, and the visibility of the stop. In addition, the Court noted that, "[a]t no point during that interval was respondent informed that his detention would not be temporary." We find

that, based on the information before the district court, the factors enunciated in *Berkemer* indicate that James was not in custody. The evidence before the district court did not disclose the duration of the detention in this case nor did it reveal the extent of questioning. As to the visibility of the stop, although it was nighttime, the stop took place on Interstate 84. James was not handcuffed. Setting aside, for the moment, the effect of Deputy Sterling's threat of arrest, it is evident that James failed to demonstrate that his freedom of movement was restrained to the degree associated with formal arrest.

Id. The Idaho Supreme Court explicitly stated that “a conditional threat of future lawful arrest alone does not transform detention into ‘custody’ for the purposes of *Miranda*.” 148 Idaho 574, ____, 225 p.3d 1169, 1171.

As stated above, in Idaho, the totality of the circumstances must be evaluated to determine whether the pressures against which *Miranda* warnings militate were present, and factors to consider include: the location of the interrogation, the conduct of the officer(s), the nature and manner of the questioning, the time of the interrogation, and other persons present. *State v. Medrano*, 123 Idaho 114, 117-8, 844 P.2d 1364, 1367-68 (Ct.App. 1992). Here, Campbell was stopped in a gas station parking lot at the intersection of 15th Street and Best Avenue in Coeur d'Alene, Idaho, in the early morning hours of December 2, 2009. The *James* factor that Campbell was “afforded little exposure to public view”, is simply not present in this case. The *James* factor that “James knew that when the interrogation occurred it was no longer an investigation of a traffic violation, but had become an investigation of a felony drug offense”, at some point in time is present in this case, but certainly not at the point Cantrell first spoke to Campbell. Not until about halfway through Buhl's conversation with Campbell could Campbell have known she had become part of an investigation of a felony drug offense. In *James*, all occupants in the vehicle had been subjected to a frisk, which is not usually done during a traffic stop but is permissible for officer safety purposes, and at the time Campbell made her statements, that

clearly had not been done. It does not appear from the evidence that even Campbell had been frisked at the time she made all her incriminating statements. Finally, the feature of *James* as to the officer's interrogation technique, threatening to arrest all occupants if none admitted possession of the drugs, which was correctly found to be more coercive than usual traffic violation questioning, is simply not present in Campbell's stop. It is important to keep in mind that even with the significantly more constrictions present in *James*, the Idaho Supreme Court found the detention had not been transformed into "custody" for the purposes of *Miranda*.

There is no evidence before the Court at this time to indicate Campbell was pressured so as to sufficiently impair her free exercise of her privilege against self-incrimination to require that she be warned of her constitutional rights. In fact, at the time Cantrell asked Campbell about marijuana, it appears Cantrell had called for assistance from Buhl and the K9, but they had not yet arrived. Thus, Cantrell was the only officer on the scene when Campbell was asked about the marijuana on the first occasion. Campbell had been stopped; asked to provide her license, registration, and proof of insurance (which was noted by Cantrell as expired); asked to step out of the vehicle and away from the three other passengers; and asked whether there was marijuana in the car and why the car smelled of marijuana. There is no evidence that Campbell was handcuffed, or that Cantrell or Buhl, who arrived later, drew their weapons. At the time Campbell made her statements to Buhl, there were obviously two officers and two patrol cars present, but the three passengers were still inside Campbell's car.

The State's argument that the questioning was not "lengthy" is corroborated by the fact that according to the police report Cantrell's questioning Campbell about the marijuana (which elicited the Campbell's incriminating statement) occurred very early on, almost

immediately after the stop. This was one of the first issues discussed, and that discussion occurred well before Campbell was administered field sobriety tests, and before the drug dog arrived. Campbell's statements to Buhl obviously occurred later, but given the time frame testified to by Buhl, were made by Cantrell about two to three minutes after Buhl had arrived, or about four to five minutes after the stop by Cantrell was initiated. Given the brief interaction Campbell had with Cantrell before her statements regarding drug use were uttered to Cantrell, and the circumstances surrounding her uttering of the statements, this Court finds there was no custodial interrogation at the time Campbell spoke to Cantrell. The only thing that was different with Campbell's statements to Buhl was the addition of an additional officer (Buhl), Buhl's patrol car, and his drug dog. It is not clear when the third officer arrived. Buhl testified that the third officer arrived a few minutes after Buhl had arrived, which could have been before, during or after Buhl's short conversation with Campbell. Even if the third officer had arrived, he was certainly not involved with the conversation with Campbell. Given the fact that Campbell's conversation with Buhl occurred less within three minutes after her conversation with Cantrell, this Court finds no custodial interrogation had occurred at the time Campbell spoke with Buhl.

Important to this Court's finding that no custodial interrogation had occurred at the time Campbell made her incriminating statements to Cantrell and to Buhl, is the fact that before Buhl came back to talk to Campbell, Cantrell had simply walked away from Campbell, leaving her alone at the scene momentarily. While it is an objective standard, that fact certainly supports the finding that a reasonable person would feel they were free to leave at that time.

Given the short period of time that had occurred between Campbell's statements to Cantrell (within two minutes of the stop), and the short period of time that had occurred

between Campbell's statements to Buhl, the fact that Campbell was left unattended by Cantrell before Buhl came back to Campbell and began inquiring, coupled with the other features in this stop discussed above, this Court is unable to find that the detention had been transformed into "custody" for the purposes of *Miranda*.

IV. CONCLUSION AND ORDER.

For the reasons stated above, defendant Campbell's Motion to Suppress must be denied. No violation of *Miranda* occurred.

IT IS HERBY ORDERED THAT ALISHA BRITTNEY CAMPBELL's Motion to Suppress is **DENIED**.

DATED this 25th day of June, 2010.

JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of June, 2010 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney - Dennis Reuter
Prosecuting Attorney - Art Verharen

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY: _____
Deputy